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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMES CARTER,<br><br>Defendant and Appellant. | B209656<br><br>(Los Angeles County<br>Super. Ct. No. BA328695) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Kennedy-Powell. Affirmed as modified.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Appellant was charged with one count of possession of cocaine base for purposes of sale, in violation of Health and Safety Code section 11351.5. He appeals from his conviction of the charge, contending that the trial court erred in denying his *Wheeler/Batson* motion.[1] Appellant also contends that the court construction fee imposed at sentencing exceeded the amount authorized by statute. Finally, appellant requests a review of the trial court's in camera rulings pursuant to his *Pitchess* motion for discovery of the arresting officers' personnel records.[2]

We conclude that the trial court did not err in denying appellant's *Wheeler/Batson* motion, and that the trial court's in camera rulings were not an abuse of discretion. We agree that the court construction fee exceeded the authorized amount, and we modify the judgment accordingly. Further, we amend the judgment to reflect the assessment of other mandatory penalties. We affirm the judgment as modified.

## BACKGROUND

### 1. *The Evidence Relevant to the Appeal*

The prosecution evidence presented at appellant's jury trial included the testimony of Los Angeles Police Sergeant Drummer and Officers Parker and Oliver. Officers Oliver and Parker testified that they were monitoring narcotics activity in the vicinity of Winston and Los Angeles Streets on September 7, 2007, at approximately midnight.

Officer Oliver watched appellant as he stood on a sidewalk in the area. Oliver saw several persons approach appellant at separate times. Appellant engaged them in brief

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[1] See *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162; and discussion, *infra*.

[2] See Penal Code sections 832.7 and 832.8; Evidence Code sections 1043 through 1045; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-82; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); and discussion, *infra*.

conversation before accepting money with his right hand while handing a small object to the person with his left hand. Officer Parker was concentrating on the activities of another suspect, Cedric Armstrong, who walked up and down the area and engaged in two hand-to-hand transactions before appellant approached and walked with him. The officers called in two other officers to arrest appellant and Armstrong.

Sergeant Dummar and Officer Parillo were the officers called in to make the arrest. As they approached the suspects and ordered them to turn around, Dummar observed Armstrong drop a small plastic bag containing a white solid object. When appellant turned and walked toward the nearby building, Dummar saw, on the ground next to appellant's right foot, a large plastic bag containing individually packaged off-white objects. Officer Oliver testified that he had seen appellant place the bag on the ground as the arresting officers approached him. Parillo took possession of the bag, and both men were arrested. When appellant was booked, marijuana and approximately $208 were found in his clothing.

The contents of the large plastic bag were tested by a criminalist with the Los Angeles Police Department Narcotics Analysis Unit. She determined that the substance was cocaine in the form of cocaine base.

Fingerprint expert Kurt Kuhn testified for the defense that he examined the plastic bags in which cocaine was found, and was unable to lift any identifiable fingerprints from them. Appellant's wife, Keisha Williams, also testified for the defense. She testified that on the day of appellant's arrest, they argued about his intention to go downtown to have some beers with his uncle. When appellant left the house after their argument, he took their piggy bank with approximately $100 inside.

### 2. *The* Pitchess *Motion*

Prior to trial, appellant brought a *Pitchess* motion for discovery of information in the arresting officers' personnel files or other Los Angeles Police Department records

regarding any conduct amounting to moral turpitude, and any allegations of dishonesty and fabrication.

The motion was supported by defense counsel's declaration in which she stated that appellant's defense would include evidence that Los Angeles Police Sergeant Drummer and Officers Parker, Oliver, and Parillo, falsified their police reports, and that Parker falsely testified at the preliminary hearing.

The motion was granted, and the trial court conducted an in camera hearing to review records produced by the custodian of records of the Los Angeles Police Department. The court found that none of the information reviewed in camera was discoverable.

### 3. *The* Wheeler/Batson *Motion*

During jury selection, in response to court questioning, Prospective Juror No. 4360-B (Juror No. 7) stated that, a long time ago, her son had been arrested and charged with armed robbery as a juvenile, and had spent three years in custody on the charge. Juror No. 7 went to court with her son during that time, and thought he was treated fairly. When defense counsel asked Juror No. 7 whether she had any opinion regarding the credibility of police officers, she replied, "Well, depends. You know, you look at them. I judge, you know, from the evidence or whatever. [¶] . . . [¶] . . . Police do lie, so you got to look at all evidence." She agreed with counsel's suggestion that police officers were like all human beings, some honest and some not, and said she would judge them as she would any other witness. The prosecution asked no questions of Juror No. 7.

After the prosecution had used four of his peremptory challenges to excuse other prospective jurors, he challenged Juror No. 7. Defense counsel objected, representing to the court without contradiction that Juror No. 7 was the only African-American prospective juror on the panel. In response, the prosecutor explained that he challenged Juror No. 7 because her son had been arrested as a juvenile for robbery. He suggested

that his reasoning was no different from his challenge to several jurors whose relatives had used drugs or who had been arrested on drug or theft charges. He believed they were Prospective Juror Nos. 2, 3, and 6.

The court found the challenge to be race neutral.

### 4. *Sentence and Appeal*

The jury convicted appellant as charged. On June 20, 2008, the trial court suspended imposition of sentence and placed appellant on formal felony probation for three years, conditioned upon, among other things, serving 180 days in jail, with seven days' custody credit. The court ordered appellant to pay a restitution fine of $200, a parole revocation restitution fine of $200 (suspended), a laboratory analysis fee of $50, subject to a penalty assessment, a court security fee of $20, and a court construction fee of $135. Appellant filed a timely notice of appeal from the judgment.

## DISCUSSION

### 1. *Denial of Appellant's* Wheeler/Batson *Motion*

Appellant, who is African-American, contends that the prosecution challenge to the only African-American prospective juror violated his right to equal protection under the United States Constitution and his right to a jury trial under the California Constitution. The use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias violates both the state and federal constitutions. (*Batson, supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Even the challenge of a single juror solely on the basis of race is an error of constitutional magnitude requiring reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) However, it is presumed that the prosecution uses its peremptory challenges in a constitutional manner. (*Wheeler*, at p. 278.)

Ordinarily, to rebut the presumption of constitutionality, the objecting party must first make a prima facie showing that jurors were challenged solely on the basis of their

presumed group bias. (*Wheeler*, *supra*, 22 Cal.3d at pp. 278-281.) Once the objecting party makes the required showing, the burden shifts to the other party to articulate a race-neutral reason for the challenge.[3] (*Batson*, *supra*, 476 U.S. at p. 94; *People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).) The objecting party retains the burden of proving purposeful discrimination, and once a race-neutral reason has been articulated, the trial court determines whether the objecting party has carried his burden. (*Johnson v. California*, *supra*, 545 U.S. at pp. 170-171.)

Without waiting for a ruling on appellant's showing, the prosecutor explained that he challenged Juror No. 7 and several jurors for the same reason: A relative had used drugs or had been arrested on drug or theft charges. Juror No. 7's son had been arrested as a juvenile for robbery. Similarly, the prosecutor explained, the brother-in-law of Prospective Juror No. 6 (9178-L) had been arrested for theft, and the grandson of Prospective Juror No. 2 (6801-T) had been arrested as a juvenile and charged with the sale of marijuana. On its face, the fact that a relative has been convicted of a crime is a valid, race-neutral reason to strike a prospective juror. (*People v. Cruz* (2008) 44 Cal.4th 636, 655-656, fn. 3.)

The court did not expressly rule on whether appellant made a prima facie showing. Thus, once the prosecutor offered a race-neutral explanation, the issue whether a prima facie showing was made became moot. (See *Hernandez v. New York* (1991) 500 U.S. 352, 359; *Lenix*, *supra*, 44 Cal.4th at p. 613, fn. 8.)

The trial court's determination that the prosecution's motive for the challenge was nondiscriminatory presents a question of fact, which we review for substantial evidence. (*Hernandez v. New York*, *supra*, 500 U.S. at pp. 364-365; *Lenix*, *supra*, 44 Cal.4th at pp. 613- 614.) "We review a trial court's determination . . . '"with great restraint."'

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**3** The reason for the challenge must be " ' "clear and reasonably specific" . . . .' [Citation.] '[but] need not support a challenge for cause, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.]" (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

[Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)

Appellant contends that the prosecution's reason for challenging Juror No. 7 was a pretext for racial discrimination, and that this contention is supported by a comparative analysis of several jurors who were accepted by the prosecution. A "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Lenix, supra*, 44 Cal.4th at p. 622.)

Appellant's first comparison is to the prosecution's acceptance of Juror No. 9 (1146-T), who was seated after the court had ruled on appellant's *Wheeler/Batson* motion. Juror No. 9 does not provide an apt comparison. Appellate review is "necessarily circumscribed. . . . [T]he trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made." (*Lenix*, *supra*, 44 Cal.4th at pp. 622, 624.) Because appellant did not renew his objection at the time Juror No. 9 was accepted, he has not preserved this comparison for appellate consideration.[4] (*Id*. at p. 624.)

Appellant surmises that the prosecution's reason for challenging e Juror No. 7 was a belief that a poor experience with police officers or the judicial system would adversely affect the juror's evaluation of the testifying officers' credibility. He then compares Juror No. 7 with two accepted jurors, one who thought she had not deserved a traffic ticket

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[4] Moreover, appellant's comparison depends, in part, on his assumption that Juror No. 9 was not African-American. However, this assumption is unsupported by the record. New jurors had been called in by then, and the record does not indicate Juror No. 9's race.

(Prospective Juror No. 4, 1517-S), and another whose friend had told him that a police officer once searched his car without just cause (Prospective Juror No. 1, 7430-E). We reject this comparison, because the correct analysis begins with the prosecution's actual, proffered reason for the challenge, not with conjecture regarding the prosecution's unexpressed reasoning. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1295.)

Further, comparisons to accepted jurors may tend to show purposeful discrimination "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241; *Lenix, supra*, 44 Cal.4th at p. 621.) Here, the prosecution's reason for striking Juror No. 7 -- a relative who was arrested for theft -- does not apply just as well to the seated jurors who resented a traffic citation or search.

Quoting *Miller-El v. Dretke, supra*, 545 U.S. at page 246, appellant points to the prosecution's failure to ask any questions of Juror No. 7 as evidence that the explanation was "a sham and a pretext for discrimination." However, a review of the entire record of voir dire fails to support such an inference, because the trial court asked almost all the questions, and gave counsel only a limited time to ask follow-up questions. Indeed, we have found no evidence of a racial motivation beyond the fact that the challenged juror and appellant were both African-American. That fact, without more, does not give rise to an inference of racial discrimination. (*People v. Bell* (2007) 40 Cal.4th 582, 598.)

On the other hand, substantial evidence supports the trial court's finding that the challenge was not motivated by racial bias. First, the prosecution gave a race-neutral explanation. Second, the prosecution challenged the only other prospective jurors who fell within that explanation, and both were non-African-Americans. We conclude that appellant failed to meet his burden of proving purposeful discrimination. (See *Johnson v. California*, *supra*, 545 U.S. at pp. 170-171; *Lenix, supra*, 44 Cal.4th at pp. 612-613.)

**2. *Correction of Fees and Penalties***

Appellant contends that the court erroneously calculated the court construction fee imposed at sentencing pursuant to Government Code section 70372, subdivision (a), which provides that on every $10 assessed as a fine (except a restitution fine), penalty, or forfeiture imposed and collected by the courts for all criminal offenses, the sentencing court must add a court construction fee of $5, as reduced by the Los Angeles County as provided in Government Code section 70375, subdivision (b). Respondent agrees. In Los Angeles County, the construction fee has been reduced to $3 on every $10 assessed as a fine or penalty. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1529.) The court imposed a $50 laboratory analysis fee, which was subject to a $50 penalty under Penal Code section 1464, subdivision (a)(1). Thus, the court construction fee should have been $15.

The trial court did not set forth the individual amounts of the fines and penalties assessed, but instead, simply said "the lab fee fine of $50 subject to penalty assessment." There is no abstract of judgment, and the clerk did not set forth the amounts of the fines and penalties in the minutes. The trial court must provide a detailed recitation of each fee, fine, and penalty and set them forth in the abstract of judgment. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200-1201.) Statutory penalties are mandatory and may be corrected or assessed for the first time on appeal. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153-1154.)

Because the court did not recite each required fee, fine, and penalty separately, and the record does not include an abstract of judgment, we asked the parties for additional briefing, with the amounts that should have been assessed, to assist this court in amending the judgment. The parties agree that in addition to the court construction fee of $15, the laboratory analysis fee of $50, and a $50 penalty pursuant to Penal Code section 1464, subdivision (a)(1), the sentencing court should have imposed a $35 penalty pursuant to Government Code section 76000, subdivision (a)(1), a $10 penalty pursuant to Government Code section 76000.5, subdivision (a)(1), a $5 DNA state-only penalty

under Government Code section 76104.6, subdivision (a)(1), and a $5 DNA penalty pursuant to Government Code section 76104.7, subdivision (a)(1). In addition, respondent points out that the court imposed a $200 parole revocation fine, but because it ordered probation, that the fine should have been a probation revocation restitution fine pursuant to Penal Code section 1202.44.

We shall correct the judgment accordingly.

### 3. *The In Camera* Pitchess *Hearing*

The trial court granted appellant's *Pitchess* motion for discovery of relevant evidence contained in the personnel files and other confidential records pertaining to Sergeant Dummar and Officers Oliver, Parillo, and Parker. (Pen. Code, §§ 832.7, 832.8; Evid. Code, §§ 1043-1045; see *City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at pp. 81-82.) In granting the motion, the trial court limited its review to records relevant to any alleged false reporting by the officers. The court found no relevance of any of the documents to that issue. Appellant requests a review of the trial court's determination that there were no discoverable items in the records produced.

The records produced in the trial court were not retained, but the sealed transcript of the in camera hearing demonstrates that the custodian of the records described them, and that the trial judge examined each one. We find the transcript sufficiently detailed to review the trial court's discretion, without having to order the production of the same documents in this court. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.)

We review the trial court's determination for an abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) Upon review of the sealed record of the in camera proceedings, we conclude the trial court properly exercised its discretion in determining that the documents produced complied with the scope of the *Pitchess* motion, and that none of the documents or information should be disclosed to the defense.

## DISPOSITION

The judgment is amended as follows: The court construction fee is reduced to $15; in addition to the $50 laboratory analysis fee already imposed, appellant is ordered to pay a $50 penalty pursuant Penal Code section 1464, subdivision (a)(1); a $35 penalty pursuant to Government Code section 76000, subdivision (a)(1); a $10 penalty pursuant to Government Code section 76000.5, subdivision (a)(1); a $5 DNA penalty under Government Code section 76104.6, subdivision (a)(1), and a $5 DNA penalty under Government Code section 76104.7, subdivision (a)(1); and the $200 fine imposed in addition to the restitution fine is modified to reflect that is imposed pursuant to Penal Code section 1202.44. As so amended, the judgment is affirmed. The trial court is ordered to issue an abstract of judgment reflecting these amendments.

LICHTMAN, J.*

WE CONCUR:

RUBIN, J.

BIGELOW, P.J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.